

CITY OF HOUSTON TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
Legal Department

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2006 JUN -9 AM 10:42

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June 7, 2006

LaDonna Castanuela
TCEQ Clerk of the Commission
P.O. Box 13087
Austin, TX 78711-3087

RE: Permit No. 40072, Application by Southern Crushed Concrete, Inc. To Change
the Location of Concrete Rock Crushing Facility in Harris County]

Dear Ms. Castanuela:

Please find enclosed the original and eleven copies of the Response of the City of Houston to the Executive Director's Response to Commissioner's Questions. I have sent copies to the parties on the Distribution list by both facsimile and in first class mail on this 7th day of June, 2006.

Thank you.

Sincerely,

G. Iona McAvoy
Senior Assistant City Attorney
713-247-1152

SOAH DOCKET NO. 582-05-1040
TCEQ DOCKET NO. 2004-0839-AIR

APPLICATION BY SOUTHERN
CRUSHED CONCRETE, INC., TO
CHANGE THE LOCATION OF A
CONCRETE CRUSHING FACILITY IN
HARRIS COUNTY PURSUANT TO
PERMIT NO. 40072

§ BEFORE THE STATE OFFICE
§ of
§ ADMINISTRATIVE HEARINGS
§ and the
§ TEXAS COMMISSION ON
§ ENVIRONMENTAL QUALITY

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CHIEF CLERK'S OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

**CITY OF HOUSTON'S RESPONSE TO ED'S RESPONSE TO OGC LETTER OF
MAY 10, 2006 AND MOTION TO STRIKE AS NON-RESPONSE**

COMES NOW, the City of Houston ("City") and hereby submits its response and Motion to Strike, to the Response filed by the Executive Director ("ED") of the Texas Commission for Environmental Quality ("TCEQ") in the above-styled matter.

The City of Houston joins in responses filed by the Motion by the Protestant Citizens Against Southern Crushed Concrete ("Citizens") and Harris County ("County") and incorporates them in by reference, and additionally files this separate Response and Motion to Strike the response of the ED as non-responsive and completely inadequate as a valid response to the six questions posed by the Commissioners.

In support thereof the City would show:

1. The Commissioners of the TCEQ expressly requested that the Office of General Counsel (OGC) file a response to questions and issues that the Commissioners raised while reviewing the documents, testimony and exhibits filed before the TCEQ in the above entitled matter. The response provided by the ED fails completely to analyze or address the specific issues of this important matter involving an air permit for a concrete crusher, giving only a cursory review of present regulations, which are

already well known to the TCEQ Commissioners and the basis of their queries. It is patently clear on its face that the perfunctory response completely fails to look at this particular permit and fact situation, ignoring the immense amount of evidence and documentation, instead simply parroting back the regulations. The only citations proffered were from the Applicant as if verifying the checklist on their response, never once addressing the detailed questions and issues raised by the six questions proffered by the Commission.

The Commissioners asked six (6) detailed and specific questions that relate to the permit application and contested case for a concrete crushing facility located in Houston, Harris County, Texas. In the ED's reply there is a four (4) page response that on its face expressly shows that there was at most a cursory review of the extensive file and evidence that is before the Commission, and clearly the response failed to address the concerns raised in the testimony and evidence from the Protestants and their exhibits. The response on the six questions by the ED focuses instead on whether Applicants' followed the rules and regulations to meet their burden of proof required by those regulations, but that was not a question raised by the Commissioners.

The Commissioners asked very specific questions, and indeed, did ask whether the regulations in place were adequate. But the response failed to look at this permit situation, focusing solely on the Applicant's response and whether it had met the requirements, stating that the requirements sufficed. To avoid completely any argument made by the Protestants, to fail to even minimally address those concerns, demonstrates a complete abdication of responsibly responding to the questions raised. The Commissioners did not ask if the Applicant's permit met the basic requirements, but asked that there be a real analysis of the specific facts of this case to see if the problems indicated by the Protestants and noted by the Commissioners were issues that needed to be addressed.

The ED's preemptive defense for this cursory response appears to lie in the preliminary pages which state that the ED was not a party to the contested case. The ED appears to offer this reasoning as justification for ignoring the extensive contested case record, the many exhibits, the testimony of the experts or many arguments and documents filed by all the parties as rationale for not providing the Commissioners a thorough analysis and dialogue on the six questions.

Under the statutes, Health & Safety Code, Subtitle C. Air Quality Chapter A §382.02 it states:

Policy and Purpose (a) The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility. (b) It is intended that this chapter be **vigorously enforced**..." (Emphasis added)

A clear example of how the ED ignored the entire file, the real questions or the evidence is found in the response to Question 5, **"Whether Applicant's use of the "Bissonnet" monitor to provide background concentrations for PM_{2.5} is consistent with agency practice and/or guidelines and whether it was appropriate in this case."**

That the Bissonnet monitor is NOT the closest was not even considered by the ED in its response, it is clear that the ED did not even bother to read the file on the monitor issue or investigate the TCEQ records, the language they use indicates that it is not something that the ED bothered to read or investigate despite the clear question from the Commissioners. Nor did the ED address the issues raised by the Commissioner's question and the expert testimony about whether the Bissonnet monitor reflects accurately the location of the requested permitted rock crusher. Had the ED looked at this information it could have replied to the Commission's request on whether that specific monitor was indeed an appropriate monitor to accurately reflect the rock crusher location and whether its location was such that it could be used to protect the health and welfare of the citizens of the area. Instead, the response is vague and non-responsive on its face.

It is patently clear that the ED did not respond to the questions raised by the Commission in a manner that reflects anything more than a cursory look at the questions and Applicant's permit submission. In each question it replied by giving the known regulations and defending them as adequate, rather than analyzing the issue and providing any type of probative analysis.

2. **The City urges the Commission to have a complete analysis done in a manner that is responsive to the important questions raised by the Commission, and one that reflects an complete analysis of all the documents, including those of the Protestants and their Experts. The response filed by the ED lacks any analysis other than defending the present regulations rather than looking at whether those regulations aptly apply to the protection of the citizens in this particular situation.**

Under the TX. Water Code Ann § 5.012 the TCEQ commission has the "power to perform any acts whether specifically authorized by this code or other law or implied by this code or other law, necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws." The Commission, when it asked that the six questions be addressed, clearly was authorized to look beyond the regulations in place. The questions indicate a need to analyze whether the regulations that are part of the present permitting requirements for a concrete/rock crusher are adequate or appropriate **in this particular fact situation**. The Commission is empowered to look past the basic requirements. *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W. 3d 264 (Tex. 2004)

Had the ED provided any argument reflecting arguments about each issue, the response would have given the Commission the requested information upon which it could make an informed decision on whether or not to grant the permit application and what is good for the health, safety and welfare of the people who must live with the concrete crushing facility. There is room in the application of regulations for analysis and for interpretation, and the Commission as part of the agency can interpret the

regulations. *BFI Waste Systems of North America, Inc. And Texas Natural Resource Conservation Commission v. Martinez Environmental Group*, 93 S.W. 3d 570, (Tex. 2002) The Commission asked relevant and important questions that concerned the specific facts of this matter before them. In looking to apply the regulations the Commission requested for an analysis of how the present regulations applied to this particular fact situation. What they received was a response that the Applicant had met those regulations without any real regard to the specifics of the matter.

This permit is about real people, citizens of the State of Texas who are concerned that putting yet another concrete crushing facility in an area that already has its share of such facilities. Citizens who are concerned how this will further impact their health, their welfare and their safety and that of their families and employees. The response provided by the ED failed to adequately and fairly address these issues and facts and is non-responsive on its face to the questions raised by the Commissioners.

These are real people, with real concerns and the six questions proffered by the Commissioners recognized that while the regulations may be adequate they may not be effective in this particular fact situation. The response by the ED fails completely to analyze the questions in a manner that reflects anything more than a superficial review of the regulations and whether the Applicant met those regulatory requirements.

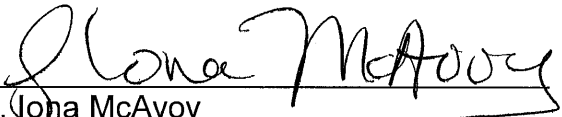
PRAYER

The City of Houston therefore urges that this Commission provide the protection to the citizens of this impacted area and require that a detailed and responsive reply to their six questions be done so that justice may be served. The Commission is bound to analyze the permit request so that the protection of the citizens is paramount. The questions asked were important, and the failure of the ED to provide a detailed and objective analysis leaves those questions unanswered.

Thus the City of Houston prays that this Court GRANT this Motion to Strike the Response as Unresponsive, and require that the OGC order that a comprehensive and responsive analysis be provided to the Commission prior to any decision being made on the pending permit by the Applicant, Southern Crushed Concrete.

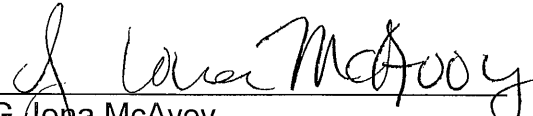
Respectfully Submitted,

ARTURO MICHEL
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CITY OF HOUSTON


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HOUSTON

CERTIFICATE OF SERVICE
SOAH DOCKET NO. 582-05-1040
TCEQ DOCKET NO. 2004-0839-AIR

I, Iona McAvoy, do hereby certify that on June ^{4th} 7, 2006, a true and correct copy of the foregoing City's Response to ED's Response and Motion to Strike Response, was served upon the parties in the above-docketed proceeding and were sent via facsimile and/or e-mail and by regular mail if requested, to the persons listed on the attached mailing list.


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City of Houston Legal Department

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